Hong Leong Bank Bhd v Percetakan Melati Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–457 OF 1998
KAMALANATHAN RATNAM J
7 AUGUST 2002

Civil Procedure *— Action — Cause of action — Joint contract based on letter of guarantee signed — Final judgment entered against three defendants — Whether judgment obtained was on a joint and several liability basis — Whether there was cause of action against sixth defendant*

The plaintiff bank provided various loan facilities to the first defendant pursuant to a loan agreement and debenture and three other charges. By a letter of guarantee, the second to sixth defendants guaranteed the due performance of the loan by the first defendant. The plaintiff issued this writ on 3 July 1998 and claimed against all the defendants under the various loan facilities with interest and costs. All the defendants entered their appearances on 24 July 1998. The plaintiff obtained judgment in default of appearance against the fourth defendant and applied to strike off the defence of all other defendants. The plaintiff succeeded against the third and fifth defendants only. However, to date, the plaintiff had not extracted the said order. On 2 May 2002, the sixth defendant applied to strike out the plaintiff's suit on the grounds that since the second to sixth defendants had guaranteed the loan and since the plaintiff had taken judgment against the third to fifth defendants, the claim against him had merged in the judgment already obtained against the third to fifth defendants.

Held, dismissing the plaintiff's claim against the sixth defendant with costs:

Since the second to sixth defendants signed the same letter of guarantee, there could be no dispute that it was a joint contract. To compound the issue, the plaintiff had not even extracted the judgment obtained against the third and fifth defendants. However, the extracted judgment against the fourth defendant made no mention that the judgment had been obtained against him on a joint and several liability basis. It was a mere judgment against him for the same prayers being sought against the sixth defendant. Since the final judgment had been entered against the three defendants, it was the court's judgment that there was no cause of action remaining against the sixth defendant (see pp 72H–73B); *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741 followed.

[Bahasa Malaysia summary

Plaintif bank menyediakan pelbagai kemudahan pinjaman kepada defendan pertama menurut satu perjanjian pinjaman, debentur dan tiga cagaran lain. Melalui sepucuk surat jaminan, defendan kedua

hingga keenam telah menjamin pelaksanaan sempurna pinjaman tersebut oleh defendan pertama. Plaintif telah mengeluarkan writ ini pada 3 Julai 1998 dan membuat tuntutan terhadap kesemua defendan di bawah pelbagai kemudahan pinjaman tersebut dengan faedah dan kos. Kesemua defendan memasukkan kehadiran mereka pada 24 Julai 1998. Plaintif memperolehi penghakiman ingkar kehadiran terhadap defendan keempat dan memohon untuk membatalkan pembelaan defendan-defendan yang lain. Plaintif berjaya terhadap defendan ketiga dan kelima sahaja. Namun begitu, sehingga kini plaintif masih belum mengeluarkan perintah tersebut. Pada 2 Mei 2002, defendan keenam memohon untuk membatalkan guaman plaintif atas alasan bahawa oleh kerana defendan kedua hingga keenam telah menjamin pinjaman tersebut dan memandangkan plaintif telah memperolehi penghakiman terhadap defendan ketiga hingga kelima, tuntutan terhadapnya telah tercantum dalam penghakiman yang telah pun diperolehi terhadap defendan ketiga hingga kelima.

Diputuskan, menolak tuntutan plaintif terhadap defendan keenam dengan kos:

Memandangkan defendan kedua hingga keenam menandatangani surat jaminan yang sama, tidak boleh dipertikaikan bahawa ia adalah kontrak bersama. Untuk memburukkan lagi isu tersebut, plaintif tidak pun mengeluarkan penghakiman yang diperolehi terhadap defendan ketiga dan kelima. Namun demikian, penghakiman yang dikeluarkan terhadap defendan keempat tidak menyebut bahawa penghakiman telah diperolehi terhadapnya atas dasar liabiliti bersama dan berasingan. Ia cumalah satu penghakiman terhadapnya untuk permohonan sama yang dipohon terhadap defendan keenam. Oleh kerana penghakiman muktamad telah dimasukkan terhadap tiga defendan tersebut, ia merupakan penghakiman mahkamah bahawa tiada kausa tindakan kekal terhadap defendan keenam (lihat ms 72H–73B); *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741 diikut.]

Notes

For cases on cause of action, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 56–66.

Cases referred to

Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors [2002] 2 CLJ 741 (folld)

SJ Ooi (*Wong-Chooi & Mohd Noor* for the plaintiff.

P Latsmanan (*Khor Gaik Thiam & Latsmanan*) for the first, second and third defendants.

BC Tan (*BC Tan & Co*) for the sixth defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff bank provided various loan facilities to the first defendant pursuant to a loan agreement and debenture dated 18 October 1997 and three other charges made on 6 November 1997. By a letter of guarantee dated 18 October 1997, the second to sixth defendants guaranteed the due performance of the loan by the first defendant. The plaintiff issued this writ on 3 July 1998 and claimed against all the defendants under the various loan facilities with interest and costs. All the defendants entered their appearances on 24 July 1998. The sixth defendant filed his defence on 20 August 1998. The second defendant filed his defence on 2 September 1998. The plaintiff applied by summons to strike off the defence of the second and sixth defendants. In the meantime, the first, third and fifth defendants filed their defence on 21 January 1999. On 24 March 1999, the plaintiff obtained judgment in default of appearance against the fourth defendant. The plaintiff then applied by way of summons to strike off the defence of the first, third and fifth defendants and to be given liberty to enter judgment as prayed. On 13 November 1999, the plaintiff succeeded against the third and fifth defendants only. However todate, the plaintiff has not extracted the said order.

The sixth defendant's application

On 2 May 200, the sixth defendant applied to strike out the plaintiff's suit against him on the grounds that since the second to sixth defendants had guaranteed the loan agreement, and since the plaintiff had taken judgment against the third, fourth and fifth defendants the claim of the plaintiff as against him had merged in the judgment already obtained against the third, fourth and fifth defendants.

Findings of the court

This application has been premised on my earlier judgment in *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [2002] 2 CLJ 741. It is clear that whilst in paragraph five of the statement of claim the plaintiff had pleaded that the defendants had jointly and severally signed the letter of guarantee, however the final prayers sought against the defendants did not include the vital words 'jointly and severally'.

It is the case of the sixth defendant that whilst all the defendants jointly and severally guaranteed the loan, the prayers sought did not seek judgment on that basis.

The issue as I said in *Asia Commercial Finance*, is to see whether there was a joint contract. Since the second to sixth defendants signed the same letter of guarantee, there can be no dispute that it was a joint contract. In fact paragraph five of the statement of claim emphasizes this. To compound the issue, the plaintiff has not even extracted the judgment obtained against the third and fifth defendants. However the extracted judgment against the

A fourth defendant makes no mention that the judgment has been obtained against him on a joint and several liability basis. It is a mere judgment against him for the same prayers being sought against the sixth defendant.

Since the final judgment has been entered against the three defendants, it is my judgment that based on the reasoning I have detailed in *Asia Commercial Finance* there is now no cause of action remaining against the B sixth defendant.

Counsel for the plaintiff attempted to distinguish my decision in *Asia Commercial Finance* with this case by arguing that in this case since the judgments obtained were in default of appearance and defence, it could not be said that the judgment was final. I see no merit in this argument since C there has been no application to date, to set aside the judgments in default nor any appeals filed against the said orders. They are in that sense, final orders.

There is however a twist to this case. Counsel for the plaintiff upon being appraised of my decision in *Asia Commercial Finance* applied by way D of summons to amend the order obtained against the fourth defendant on 24 March 1999 by including the words 'jointly and severally' so that it could have an answer to this application by the sixth defendant. Since the sixth defendants application was fixed for hearing before me on 26 June 2002, the plaintiff without even serving the application on the sixth defendant or on the fourth defendant, being the affected party, appeared before the learned E senior assistant registrar on 24 June 2002 and obtained an ex parte order, to amend the order. In my view, this is not the right thing to do. The application ought to have been served on the interested parties. In any case, the order too has not been extracted and therefore I do not have the benefit of the contents of the sealed order.

F Be that as it may, the application ought to have been to firstly amend the prayer in the statement of claim against the defendants to include the words jointly and severally and the next prayer could be to amend the order. Here, the order was amended without the prayers being amended. This being a judgment in default, the court had no power to give an order beyond what has been prayed for. So even the order of the learned senior assistant G registrar giving leave to amend the order dated 24 March 1999 is bad in law. I therefore held that the decision in *Asia Commercial Finance* applied to this case and dismissed the plaintiff's claim against the sixth defendant with costs.

Plaintiff's claim against the sixth defendant dismissed with costs.

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Reported by Zahid Taib

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